

Message Text

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ORIGIN EB-07

INFO OCT-01 ARA-06 ISO-00 FEA-01 AGR-05 CEA-01 CIAE-00

COME-00 DODE-00 FRB-03 H-01 INR-07 INT-05 L-02 LAB-04

NSAE-00 NSC-05 PA-01 RSC-01 AID-05 CIEP-01 SS-15

STR-01 TAR-01 TRSE-00 USIA-06 PRS-01 SP-02 OMB-01

/083 R

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L/EB:SRBOND (INFO)

INR/DFR/REC:RKATES(INFO)

TREAS:RGOODMAN(INFO)

TREAS:WMCFADDEN(INFO)

STR:SLANDE(INFO)

COMM:DARRILL(INFO)

ARA-LA/EP:RFWEBER

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R 041915Z FEB 75

FM SECSTATE WASHDC

TO AMEMBASSY LIMA

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E.O. 11652: N/A

TAGS: EINV; ETRD

SUBJECT: COUNTRY ELIGIBILITY FOR GENERALIZED PREFERENCES

(GSP) UNDER SECS. 502(B) (4) AND (B) OF TITLE V

OF THE TRADE ACT OF 1974

REF: (A) STATE 282968; (B) STATE 282967

1. AS REPORTED REF B, BEFORE GSP CAN BE IMPLEMENTED
UNDER THE TRADE ACT OF 1974, THE INTERNATIONAL TRADE
COMMISSION (ITC) MUST INVESTIGATE THE DOMESTIC ECONOMIC
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EFFECT OF PREFERENTIAL DUTY-FREE TARIFF TREATMENT ON

IMPORTS OF THOSE ARTICLES PROPOSED FOR SUCH TREATMENT FROM COUNTRIES DESIGNATED IN AN EXECUTIVE ORDER AS BENEFICIARY DEVELOPING COUNTRIES. THIS MESSAGE DISCUSSES COUNTRY ELIGIBILITY UNDER THE NATIONALIZATION AND ARBITRATION PROVISIONS OF THE ACT.

2. SEC. 502 (B) (4) OF TITLE V OF THE ACT PROHIBITS THE PRESIDENT FROM DESIGNATING AS ELIGIBLE FOR GSP ANY COUNTRY WHICH HAS NATIONALIZED THE PROPERTY OF OF U.S. CITIZENS (INCLUDING CORPORATIONS, PARTNERSHIPS ,OR ASSOCIATIONS 50 PERCENT OR MORE BENEFICIALLY OWNED BY U.S. CITIZENS), OR TAKEN OTHER ACTIONS WITH SIMILAR EFFECT, UNLESS HE DETERMINES THAT FAIR COMPENSATION IS BEING PAID, THAT SUCH COUNTRY IS "OTHERWISE TAKING STEPS TO DISCHARGE ITS OBLIGATIONS UNDER INTERNATIONAL

LAW," OR THAT THE PARTIES HAVE SUBMITTED THE DISPUTE TO ARBITRATION. SEC. 502 (B) (6) APPLIES A SIMILAR PROHIBITION TO ANY COUNTRY WHICH FAILS TO ACT IN GOOD FAITH TO RECOGNIZE AS BINDING OR TO ENFORCE AN ARBITRAL AWARD IN FAVOR OF U.S. CITIZENS (AGAIN INCLUDING CORPORATIONS, PARTNERSHIPS OR ASSOCIATIONS 50 PERCENT OR MORE BENEFICIALLY OWNED BY U.S. CITIZENS). FYI. UNLIKE THE HICKENLOOPER AMENDMENT (SEC 620(E) OF THE FOREIGN ASSISTANCEACT), SEC 502(B) (4) (D) REQUIRES A PRESIDENTIAL DETERMINATION TO BE MADE AND FURNISHED TO CONGRESS REGARDING THE APPLICATION OF THAT SUBSECTION TO ALL UNRESOLVED DISPUTES. THIS NEW REQUIREMENT REINFORCES THE NEED FOR THE USG TO MONITOR AND TO ASSIST IN RESOLVING OUTSTANDING DISPUTES INVOLVING U.S. PROPERTY. END FYI.

3. IT WOULD BE HIGHLY DESIRABLE FOR THE ITC TO UNDERTAKE ITS PRODUCT REVIEW WITH RESPECT TO THE BROADEST POSSIBLE LIST OF POTENTIAL BENEFICIARIES, AND FOR THE COMMISSION TO BEGIN ITS WORK AS SOON AS POSSIBLE. WE WOULD PREFER TO CONDUCT A DETAILED INVESTIGATION OF CASES WHICH MIGHT AFFECT HOST COUNTRY ELIGIBILITY UNDER SECS. 502(B) (4) AND (6) WHILE THE ITC STUDY IS IN PROGRESS. FOLLOWING DISCUSSIONS WITH CONGRESSIONAL LIMITED OFFICIAL USE

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STAFFS, HOWEVER, IT IS NOT CLEAR THAT THE INTERIM WAIVER MENTIONED PARA 4 REF B WILL BE USED. SEVERAL ALTERNATIVE METHODS OF ACCOMPLISHING OUR OBJECTIVE ARE ALSO UNDER CONSIDERATION, BUT IT IS POSSIBLE THAT DETERMINATIONS OF COUNTRY ELIGIBILITY MAY HAVE TO BE MADE BEFORE THE ITC CAN BEGIN ITS PRODUCT ANALYSIS.

4. ACCORDINGLY, POSTS ARE REQUESTED TO INFORM THE

DEPARTMENT ASAP OF THE STATUS OF OUTSTANDING CASES WHICH MIGHT AFFECT HOST COUNTRY ELIGIBILITY UNDER SECS. 502 (B) (4) AND (6). CITATION TO PRIOR REPORTING WILL SUFFICE IF NO SIGNIFICANT DEVELOPMENTS HAVE OCCURRED IN THE INTERIM.

5. THE STARTING POINT FOR EVALUATION SHOULD BE THE TEXT OF THE LEGISLATION ITSELF. UNTIL DEFINITIVE LEGAL ANALYSIS OF 502 (B) (4) IS COMPLETED, POSTS SHOULD ASSUME IT APPLIES TO ALL PROPERTY (BOTH COMMERCIAL AND NON-COMMERCIAL) OF U.S. CITIZENS, WITHOUT REGARD TO VALUE. AS A "RULE OF REASON," WE ARE LIMITING THE EVALUATION TO CASES ARISING IN THE POST-WAR ERA, I.E., SINCE JANUARY 1, 1946, OR THE DATE OF INDEPENDENCE OF THOSE COUNTRIES RECEIVING INDEPENDENCE, WHICHEVER IS LATER. SINCE SOME ACTIONS (SUCH AS COERCED

PARTICIPATION, SEVERE CURTAILMENT OF MANAGEMENT PREROGATIVES, OR FORCED CANCELLATION OR RENEGOTIATION OF CONTRACTS) MAY BE EXPROPRIATORY IN EFFECT WHILE STOPPING SHORT OF OUTRIGHT TAKEOVER, POSTS REQUESTED TO INFORM DEPARTMENT OF SUCH CASES TO ENABLE US TO EXERCISE JUDGMENT IN DETERMINING WHETHER "NATIONALIZATION" HAS OCCURRED WITHIN THE MEANING OF 502(B) (4) (A)-(C). JUDGMENTS MUST ALSO BE MADE TO DETERMINE, INTER ALIA, WHETHER THE CRITERIA OF 502(B) (4) (D) ARE BEING MET, AND WHETHER "GOOD FAITH" IS PRESENT UNDER 502(B)(6). KISSINGER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: TRADE LAW, LESS DEVELOPED COUNTRIES, NATIONALIZATION, GENERALIZED PREFERENCES (TARIFFS)
Control Number: n/a
Copy: SINGLE
Draft Date: 04 FEB 1975
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: GolinoFR
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1975STATE025113
Document Source: CORE
Document Unique ID: 00
Drafter: TRBRODERICK:ET
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D750041-0626
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1975/newtext/t19750273/aaaacnvty.tel
Line Count: 142
Locator: TEXT ON-LINE, ON MICROFILM
Office: ORIGIN EB
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 75 STATE 282968, 75 STATE 282967
Review Action: RELEASED, APPROVED
Review Authority: GolinoFR
Review Comment: n/a
Review Content Flags:
Review Date: 22 SEP 2003
Review Event:
Review Exemptions: n/a
Review History: RELEASED <22 SEP 2003 by KelleyW0>; APPROVED <27 OCT 2003 by GolinoFR>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
05 JUL 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: COUNTRY ELIGIBILITY FOR GENERALIZED PREFERENCES (GSP) UNDER SECS. 502(B) (4) AND (B) OF TITLE V
TAGS: EINV, ETRD, US, ITC
To: LIMA
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 05 JUL 2006